IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1403

NELSON BUNKER HUNT, W. HERBERT HUNT and LAMAR HUNT,

Petitioners,

v.

MOBIL OIL CORPORATION, TEXACO INC., STANDARD OIL COMPANY OF CALIFORNIA, THE BRITISH PETROLEUM COMPANY, LTD., SHELL PETROLEUM COMPANY, LTD., EXXON CORPORATION, and GULF OIL CORPORATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

Of Counsel:

MARK D. WEGENER
HOWREY & SIMON
1730 Pennsylvania Ave., N.W.
Washington, D.C. 20006

RICHARD H. ZAHM
JULIET SHEPARD
Mobil Oil Corporation
150 East 42nd Street
New York, New York 10017
212/883-8315

EDWARD F. HOWREY
A. DUNCAN WHITAKER
1730 Pennsylvania Ave., N.W.
Washington, D.C. 20006
202/783-0800

Attorneys for Respondent
MOBIL OIL CORPORATION

[List of Attorneys continued on inside cover]

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D.C. 20001

G. KENNETH HANDLEY
LAWRENCE R. JERS
Texaco Inc.
135 East 42nd Street
New York, New York 10017
212/953-6000

KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER
425 Park Avenue
New York, New York 10022

JOHN W. CASTLES, 3D
HARRY G. SKLARSKY
DAVID H. MARKS
CAROLYN T. ELLIS
LORD, DAY & LORD
25 Broadway
New York, New York 10004

WALLACE L. KAAPCKE
RICHARD J. MACLAURY
PILLSBURY, MADISON & SUTRO
225 Bush Street
San Francisco, Calif. 94104

Attorneys for Respondent
STANDARD OIL COMPANY
OF CALIFORNIA

JOSEPH FERRARO
SHEA, GOULD, CLIMENKO
& CASEY
330 Madison Avenue
New York, New York 10017

ROBERT M. OSGOOD
BARBARA A. MENTZ
SULLIVAN & CROMWELL
48 Wall Street
New York, New York 10005

FRANK W. MORGAN
Gulf Oil Corporation
P. O. Box 1166
Pittsburgh, Pa. 15230
412/391-2400

CHARLES O. MURRAY, III
Gulf Oil Co.—U.S.
P. O. Box 2100
Houston, Texas 77001

Attorneys for Respondent
GULF OIL CORPORATION

CHARLES F. KAZLAUSKAS
135 East 42nd Street
New York, New York 10017
212/953-6000

MILTON J. SCHUBIN
425 Park Avenue
New York, New York 10022

Attorneys for Respondent
TEXACO INC.

GORDON B. SPIVACK
25 Broadway
New York, New York 10004
212/344-8480

BRUCE A. HECKER
330 Madison Avenue
New York, New York 10017
212/661-3200

Attorneys for Respondent
THE BRITISH PETROLEUM
COMPANY LIMITED

ROBERT MACCRATE
48 Wall Street
New York, New York 10005
212/952-8100

Attorneys for Respondent
EXXON CORPORATION

JOHN E. BAILEY
P. O. Box 2100
Houston, Texas 77001
713/226-2142

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (App. B of Petition) is reported at 410 F. Supp. 10 (1975). The opinions of the United States Court of Appeals for the Second Circuit (App. A of Petition) are reported at 550 F.2d 68 (1977).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition at p. 2.

QUESTION PRESENTED

Whether the third antitrust claim of the amended complaint was properly dismissed, on the basis of the act of state doctrine, which claim seeks to recover treble damages under the antitrust laws resulting from the nationalization of Hunt's oil properties by the Libyan government.

STATUTES

The pertinent provisions of the Sherman Act (15 U.S.C. § 1) and the Wilson Tariff Act (15 U.S.C. § 8) are set forth in the Petition at pp. 5-6.

STATEMENT

Petitioners' amended complaint alleges violations of Section 1 of the Sherman Act (15 U.S.C. § 1) and Section 73 of the Wilson Tariff Act (15 U.S.C. § 8) by reason of participation in a written contract known as the Libyan Producers' Agreement ("Agreement"); it also alleges a breach of said Agreement. Petitioner Nelson Bunker Hunt and each of the respondents were signatories to the Agreement and to supplemental agreements and amendments thereto, all of which are attached as Exhibits A through E to the amended complaint (Pet., App. E, 87a-106a).[1]

The complaint sets forth three antitrust claims and a breach of contract claim. The only claim before this

[1] Throughout this brief the Petition and Appendices attached thereto are referred to as "Pet. ——" and "Pet., App. ——", respectively.

Court is the third antitrust claim which charges that Hunt suffered injury by reason of the nationalization of his crude oil properties in Libya. The respondents, it is charged, manipulated the course of Libyan negotiations and followed a course of action that lead to Hunt's nationalization (Pet., App. E, 82a-83a).

In September 1969, Colonel Qaddafi took power in Libya under a new government known as the Revolutionary Command Council ("RCC"). It was the oft-stated intent of the RCC to increase both the price of Libyan crude oil and Libya's share of such price (the "government's take"), as well as to increase Libya's control over production and equity participation in the country's oil reserves and production facilities. The Libyan government thereafter made continual demands upon individual Libyan oil producers, including Hunt, relating first to price and government take, and then to control of production and equity participation. These demands were often accompanied by threats of cutbacks in production, embargoes and nationalization. The heightened militancy of Libya resulted in agreements which were forced upon all the oil producers in Libya in 1970, substantially increasing the take of the Libyan government (Pet., App. E, 67a-68a).

These 1970 Libyan agreements prompted similar demands by the Organization of Petroleum Exporting Countries ("OPEC") and OPEC's Persian Gulf member states (Pet., App. E, 68a).

On January 3, and again on January 9, 1971, before a scheduled January OPEC meeting and despite its own recently concluded agreements with the oil producers, Libya demanded new increases in "government take," as well as a required "reinvestment" in Libya by the oil producers. The Libyan government moved first against Hunt and Occidental Petroleum Corporation, giving each until January 16, 1971, to accept its allegedly "non-negotiable" demands (Pet., App. E, 68a).

This series of government actions by Libya and other oil producing countries raised serious questions for petroleum consuming countries throughout the world and for crude oil producers such as Hunt and respondents. The individual crude oil producers in Libya found themselves unable to conduct meaningful negotiations with the Libyan government or other oil producing countries. They decided, therefore, to endeavor to present a united front in negotiating and dealing with the actions and demands of the oil producing countries, including Libya. This decision was reflected in and implemented by a Joint Message to OPEC and by a "sharing arrangement," known as the Libyan Producers' Agreement dated January 15, 1971. These joint efforts were undertaken with the knowledge and consent of the U.S. Departments of Justice and State.[3] (Pet., App. E, 68a-69a).

The Agreement in general provided that if any party's crude oil production in Libya was cut back as the result of Libyan government action, all other producers would share in the cutback on the proportionate basis set forth in the Agreement. It further provided that if there was insufficient Libyan oil to meet contractual obligations to existing European or Western Hemisphere customers for such oil due to government restrictions, the Persian Gulf producers would supply the Libyan producers with Persian Gulf oil *at cost*, with an option to pay cash in lieu of oil at a specified sum per barrel (Pet., App. E, 87a-95a).

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[3] By its terms, the Agreement became effective only upon receipt of advice that the Department of Justice stated in writing that it had no present intention of instituting any proceeding under the antitrust laws with respect to the making or performance of the Agreement and that the U.S. Department of State interposed no objection to the Agreement and expressed its support thereof. Moreover, the U.S. companies agreed to make such reports concerning the Agreement as the Attorney General or the Secretary of State may request (Pet., App. E, 93a-94a).

The Agreement was amended or supplemented three different times during 1971 and 1972. Each time the Agreement and proposed modification were submitted to the Antitrust Division and each time the Department of Justice reaffirmed its blessing. Hunt agreed to and signed each of these amendments and supplements (Pet., App. E, 96a-106a).

On December 7, 1971, the Libyan government nationalized respondent British Petroleum Company's half of the Hunt/BP concession (the Sarir field)[4] and demanded that Hunt market BP's share of the production for Libya's account. Hunt refused the Libyan demand. As a result, Libya evicted Hunt personnel from Sarir in early 1972 and cut back Hunt's permissible oil production by 50 percent. Hunt and BP, as a consequence of these events, received crude oil from the other parties pursuant to the Agreement (Pet., App. E, 74a-75a).

In October 1972, the Libyan government demanded an immediate 50% equity participation in Hunt's interests in the Sarir field. Hunt again rejected the Libyan demands. Hunt alleges that as a result of his noncooperation with the Libyan demands, the Libyan government on December 11, 1972 refused for three weeks to permit further export of Hunt's oil until Hunt instituted arbitration proceedings against Libya. On May 24, 1973 Libya terminated his right to produce and export crude oil and on June 11, 1973 the Libyan government nationalized all of Hunt's assets (Pet., App. E, 75a-76a).

Respondents moved in the district court to dismiss the three antitrust claims by reason of the act of state doctrine and for other reasons and to stay the fourth claim pending arbitration of the dispute in accordance with

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[4] In September 1960, with the approval of the Libyan government, Hunt assigned an undivided one-half interest in his concession to respondent British Petroleum Company ("BP") (Pet., App. E, 67a).

the provisions of the Libyan Producers' Agreement. On November 5, 1975, Judge Weinfeld dismissed Hunt's third claim pursuant to the act of state doctrine, but denied the motion to dismiss the first and second claims (Pet., App. B, 28a-55a).[4]

The district court's dismissal of the third claim was based on the well-established principle that in a private action under the antitrust laws, a causal connection between the alleged violation and the alleged harm is an essential element of the claim, and that where it appears on the face of the complaint that proof of the claim would require judicial inquiry and examination of the sovereign actions and motives of a foreign government, such claim is barred by the act of state doctrine. Judge Weinfeld found that the alleged course of conduct attributed to respondents "centers about negotiations and dealings with, and action thereafter taken by, the Libyan government"; and that resolution of the third claim "clearly would require inquiry into acts and conduct of Libyan officials, Libyan affairs and Libyan policies with respect to plaintiff's as well as other oil producers' properties and the underlying reasons for the Libyan government's actions" (Pet., App. B, 47a and 49a).[5]

The court of appeals affirmed with a dissent by Judge Van Graafeiland.[6] The majority (by Judge Mulligan)

[4] Thereafter, the district court granted Hunt's motion for a final judgment dismissing the third claim as to all respondents pursuant to Rule 54(b), F.R.C.P., thus permitting an interlocutory appeal, but later denied defendants' motion pursuant to 28 U.S.C. § 1292(b), requesting certification for an interlocutory appeal from the court's refusal to dismiss the first two antitrust claims.

[5] As noted above, Judge Weinfeld did not dismiss the first and second claims. Petitioners' first claim seeks to allege a restraint on alienation; the second claim attempts to allege a group boycott. The court held that Hunt could recover under these claims, if proved, to the extent that harm to him arose from private activity.

[6] Judge Van Graafeiland dissented, but said that he was "far from convinced that plaintiffs, given the opportunity, would have been able to establish the cause of action which was dismissed" (Pet., App. A, 24a).

held that the act of state doctrine as recently affirmed by this Court in *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682 (1976), compelled dismissal of the third claim. The court agreed with Judge Weinfeld's finding that "the damage complained of [by Hunt] resulted from the action of Libya in cutting back Hunt's production, shutting off its oil and finally nationalizing its properties" (Pet., App. A, 8a). The court of appeals concluded that it was clear on the face of the complaint "that the political act complained of here was clearly within the act of state doctrine and that since the disputed pleadings inevitably call for a judgment on the sovereign acts of Libya the claim is non-justiciable" (*Id.* 10a-11a).

The court found that to determine Hunt's third claim "would require a wholesale examination of Libyan policy" and that the "action taken here is obviously only an isolated act in a continuing and broadened confrontation between the East and West in an oil crisis which has implications and complications far transcending those suggested by appellants" (*Id.* 20a-21a).

REASONS FOR DENYING THE WRIT

Petitioners ask this Court to review and rewrite the act of state doctrine. This in face of the fact that the Court dealt extensively with this issue only last term in *Dunhill*, *supra*. The opinions of district court Judge Weinfeld and court of appeals Judge Mulligan are clearly correct in applying the doctrine to acts and conduct of foreign officials in connection with the expropriation or nationalization of foreign assets located inside Libya's borders.

Petitioners seek to exempt antitrust cases from the act of state doctrine notwithstanding that the decisions below

dismissing the third claim turn solely upon the particular facts of that claim, namely, injury resulting from the acts of a foreign sovereign; that the petition presents no important question of federal law inasmuch as the law is settled and the decision below is correct; and that there is no conflict of decisions among the courts of appeal. Accordingly, there is no basis for further review of this case by this Court.

I.

Petitioners ask this Court to rewrite their third claim and read into it essential allegations clearly not stated. Totally ignored are their own allegations in support of the third claim including the principal allegation that respondents "followed a course of action that led to Hunt's nationalization and elimination from the production of Libyan crude oil" (Para. 64 of Complaint). The direct and immediate cause of Hunt's injury were actions of the Libyan government in respect of which judicial inquiry is precluded by the act of state doctrine.

Hunt alleges that beginning in September 1969, the *Libyan government* threatened to increase the price of Libyan oil and to increase its control over production and its equity participation, and that these demands were accompanied by threats of cutbacks in production, embargoes and nationalization (Para. 17); that in January 1971, *Libya* moved first against Hunt with its "non-negotiable" demands (Para. 19); that on December 7, 1971, *Libya* nationalized BP's one-half share of the Hunt/BP concession and demanded that Hunt market BP's oil for Libya's account (Para. 32); that early in 1972, as a result of Hunt's refusal to market BP's oil for Libya's account, the *Libyan government* evicted the Hunt personnel from his concession and his production was cut back by 50 percent (Para. 34); that on December 11, 1972, the *Libyan government* refused to permit further

export of Hunt's oil, as a result of Hunt's resistance to Libya's demand for an immediate 50 percent equity participation in his concession (Para. 40); that on May 24, 1973, *Libya* terminated Hunt's right to produce and export crude oil (Para. 41); and finally that on June 11, 1973, the *Libyan government* nationalized Hunt's oil concession (Para. 41) (Pet., App. E, 60a-86a).

The foregoing allegations involve government-mandated production cutbacks, export terminations, personnel evictions, participation, expropriation and nationalization of the producing companies' interests in Libya, including the interests of Hunt.

In concluding "that defendants' 'act of state' plea rests on a solid foundation" (Pet., App. B, 47a), Judge Weinfeld stated:

> To establish his claim plaintiff would have to show that such acts and conduct [of the respondents] were a material cause of his alleged damage; that but for defendants' conspiratorial manipulative activities the Libyan government would not have cut back his production, shut off his oil supply completely and then nationalized his properties. This clearly would require inquiry into acts and conduct of Libyan officials, Libyan affairs and Libyan policies with respect to plaintiff's as well as other oil producers' properties and the underlying reasons for the Libyan government's actions. (Pet., App. B, 48a-49a).

Similarly, Judge Mulligan, writing for the court of appeals, stated:

> This [adjudication of third claim] necessarily would require a wholesale examination of Libyan policy—how did it treat other companies, what provoked its 'displeasure', how far could concessions by Hunt appease President al-Qadhafi. (Pet., App. A, 20a).

Thus, Hunt's own allegations demonstrate that it was the political or public acts of the Libyan government in

cutting back his production and finally nationalizing his concession which directly caused the injury alleged in the third claim.[7]

II.

The "classic" statement of the act of state doctrine, reaffirmed by this Court in *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 416 (1964), and *First National City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759, 763 (1972), is found in *Underhill* v. *Hernandez*, 168 U.S. 250, 252 (1897), where this Court stated:

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.

Very recently, in *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682 (1976), this Court again reaffirmed the act of state doctrine, announcing that it "'precludes the courts of this country from inquiring into the validity of the *public* acts a recognized foreign sovereign power committed within its own territory.'" (citing *Sabbatino; Id.* at 706). Petitioners specifically conceded before the court of appeals that the nationalization of Hunt's properties by Libya was a public or governmental act and not a commercial act. (Pet., App. A, 9a-10a).[8]

[7] Allegations of an antitrust conspiracy without claim of injury or damage to one's property do not constitute an actionable wrong for which a private party may maintain a cause of action under the antitrust laws. The complaint must allege specific *conduct* of the defendant that purportedly violated the antitrust laws, and a description of how that conduct *damaged* the plaintiff. *Winckler & Smith Citrus Products Co.* v. *Sunkist Growers, Inc.*, 346 F.2d 1012 (9th Cir.), *cert. denied*, 382 U.S. 958 (1965). *See also, Sam S. Goldstein Industries, Inc.* v. *Botany Industries, Inc.*, 301 F. Supp. 728, 735-36 (S.D.N.Y. 1969); *VTR, Inc.* v. *Goodyear Tire & Rubber Co.*, 303 F. Supp. 773, 782-83 (S.D.N.Y. 1969).

[8] Any possible doubt about whether the Libyan nationalization of Hunt's properties was an international political act directed at

In *Dunhill* the Court reiterated that expropriations of property of an alien within the boundaries of a sovereign state are public acts of the sovereign removed from judicial scrutiny by application of the act of state doctrine (425 U.S. at 704). Thus, such action as taken here by Libya, upon which the third claim is based, is precisely the type of non-commercial sovereign activity encompassed by the act of state doctrine.

The courts have long held in antitrust cases that the act of state doctrine operates to bar judicial examination of actions of a foreign government, including in particular acts of nationalization. *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347 (1909). *See also, Occidental Petroleum Corp.* v. *Buttes Gas & Oil Co.*, 331 F. Supp. 92 (C.D. Calif. 1971), *aff'd*, 461 F.2d 1261 (9th Cir. 1972), *cert. denied*, 409 U.S. 950 (1972).[9]

Petitioners seek to avoid *American Banana* as a clear and viable precedent for the act of state doctrine by

American policy and interests generally in that area is removed by the Libyan government's own statements. Upon expropriation of Hunt's holdings in Libya on June 11, 1973, Colonel Qaddafi stated that "we proclaim loudly that this United States needs to be given a big, hard blow in the Arab area on its cold, insolent face. . . . [T]he time has come for the Arab peoples to confront the United States, the time has come for the U.S. interests to be threatened earnestly and seriously in the Arab area, regardless of the cost . . ." Statement of the State Department in the Hearings Before the Subcomm. on Multinational Corporations of the Senate Comm. on Foreign Relations, 93d Cong., 2d Sess., pt. 6, at 316-317 (1974).

[9] The court's opinion in *Occidental* noted that the significance of the *American Banana* case has been "somewhat obscured" by the fact that the opinion "expounds at some length a restrictive view of Sherman Act jurisdiction, based upon the situs of primary conduct" (331 F. Supp. at 109), but stressed that the established law is that "the holding of *American Banana* that has endured is that the act of state doctrine bars a claim for antitrust injury flowing from foreign sovereign acts allegedly induced and procured by the defendant." (331 F. Supp. at 109-110).

focusing only on the jurisdictional issue also raised in that case. (Pet. 18-19). However, the Court's approach to extraterritorial jurisdiction in *American Banana* (Pet. 19) is irrelevant, because the extraterritorial reach of the Sherman Act is not here at issue.[10]

American Banana's ruling on the act of state doctrine has been repeatedly affirmed. In *Banco Nacional de Cuba* v. *Sabbatino, supra*, 376 U.S. at 416-417, this Court cited *American Banana* and stated:

> None of this Court's subsequent cases in which the act of state doctrine was directly or peripherally involved manifest any retreat from *Underhill. See American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347 . . .

See also Ricaud v. *American Metal Co.*, 246 U.S. 304-309 (1918); *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 303 (1918); and *United Mine Workers* v. *Pennington*, 381 U.S. 657, 671 (1965).

There is also no substance to Hunt's argument that *United States* v. *Sisal Sales Corp.*, 274 U.S. 268 (1927) and *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962) have undercut the act of state doctrine.

In *Sisal*, a monopoly on sisal was achieved by a series of private actions in the United States and Mexico, *some*

[10] We do not question that the part of the opinion in *American Banana* dealing with the extraterritoriality of the Sherman Act is no longer a viable precedent. *See, e.g., United States* v. *Aluminum Co. of America, Inc.*, 148 F.2d 416 (2d Cir. 1945). However, petitioners' argument that Mr. Justice Holmes had a uniquely narrow view of the jurisdictional reach of the Sherman Act is not appropriate or relevant. As we show herein, the antitrust and act of state elements of *American Banana* are distinct from its territorial aspects. There can be no question that as to the relevant aspect of the opinion, the application of the act of state doctrine to an antitrust case, *American Banana* continues to be a viable precedent.

of which were aided by discriminatory Mexican legislation. This Court carefully distinguished *American Banana* on the Sherman Act issue, pointing out that the only harm complained of in *American Banana* was the act of seizure performed in Costa Rica, while in *Sisal* the conspiracy took place in the United States and was made effective by numerous acts performed both here and abroad.[11]

Similarly, *Continental Ore* did not turn on an act of state issue. The antitrust violation there asserted involved the actions of a Canadian subsidiary performed at the direction of its U.S. parent company, not at the direction of the Canadian government. As this Court said, plaintiff's cause of action in *Continental Ore* did not require inquiry into sovereign actions of the Canadian government. (370 U.S. at 706).[12]

Thus, neither *Sisal* nor *Continental Ore* undercut the proposition that American courts will not inquire into the political or sovereign acts of a foreign state committed within its own territory as is the case here. That

[11] The court of appeals in the present case similarly found *Sisal* not applicable, stating:

> It is clear however that [*Sisal*] does *not* purport to overrule *American Banana's* act of state holding. (emphasis added; Pet., App. A, 13A).

[12] The court of appeals below also found *Continental Ore* not relevant. The court stated:

> Since no act of the sovereign was involved in *Continental Ore* there is nothing in that case to disturb *American Banana's* holding on the act of state doctrine. It is simply not the law that merely because the action is based on the antitrust laws, the act of state doctrine is to be discarded. (Pet., App. A, 14a-15a).

Judge Weinfeld likewise found that the two decisions in *Sisal* and *Continental Ore* were not applicable to the act of state issue involved in the third claim (Pet., App. B, 50b-51b).

To the same effect: ABA Antitrust Developments 365 (1975); K. Brewster, Antitrust and American Business Abroad 97 (1958); W. Fugate, Foreign Commerce and Antitrust Laws § 2.21 (1973).

conclusion is also manifested in *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965), where this Court held that antitrust damages could not be recovered for injury suffered as a result of the acts of government. Among the cases cited for that conclusion was *American Banana*, 381 U.S. at 671.

Petitioners further contend that the court of appeals failed to apply the teaching of this Court's decision in *Cantor* v. *Detroit Edison Company*, 428 U.S. 579 (1976)[13] and other "state action" cases. This contention is defective in many respects. As petitioners admit, *Cantor* and the other "state action" cases are not act of state cases, "for they do not involve actions by *foreign* governments or the acts of *foreign* government officials." (Pet. 25). And this Court specifically found in *Cantor* that the state's policy was "neutral on the question whether a utility should, or should not, have such a [light bulb distribution] program" (428 U.S. at 585). In contrast, the Libyan government's commentary that accompanied Libya's Law 42 of 1973 that effectuated the nationalization of Hunt's interests described that act as "a warning to the United States to end its recklessness and hostility to the Arab nations." It further stated that, "In view of . . . American impudence and the continued disregard for Arab rights and destinies, it was necessary to strike a blow against U.S. policy. . . ." A. Rovine, Digest of United States Practice in International Law 1973, at 334.

[13] In *Cantor*, this Court considered the breadth of the state action doctrine in the context of a private utility company which was the sole supplier of electricity in southeastern Michigan. That company had maintained a light bulb distribution program whereby it furnished light bulbs without charge to its residential customers. Petitioner, a retail druggist who sold light bulbs, alleged that the light bulb distribution program violated the Sherman Act. The light bulb program, which predated the state's regulatory controls, was later incorporated in the tariff filed with the state regulatory agency.

We suggest that the more appropriate teaching of this Court with respect to the applicability of the act of state doctrine to the third claim bottomed on the political and sovereign acts of a foreign government is in *Alfred Dunhill of London, Inc.* v. *Republic of Cuba, supra*, decided only one week before *Cantor*. In *Dunhill*, all nine Justices reaffirmed the act of state doctrine as delineated in *Underhill* and reaffirmed in *Sabbatino*, namely, that the act of state doctrine precludes the courts of this country from inquiring into governmental acts of a foreign sovereign committed within its own territory, particularly conventional expropriations of foreign assets located inside a country's territorial borders. (*See* 425 U.S. at 686).

III.

Petitioners' suggestion of a "conflict of approach" between the decision below and that of the United States Court of Appeals for the Ninth Circuit in *Timberlane Lumber Co.* v. *Bank of America*, 549 F.2d 597 (9th Cir. 1976), is also farfetched. In reality the two cases are in accord in both principle and decision.[14] The Ninth Circuit gave full recognition to the fundamentals of the act of state doctrine as set forth in *Underhill* and later reiterated by this Court in *American Banana*, *Sabbatino*, and *Dunhill*. (Pet., App. F, pp. 117a-122a). However, the court simply found no "act of state" within the traditional formulation of the doctrine. The only "act" involved was enforcement of judicial process in the Hon-

[14] Contrary to petitioners' assertion, the Court in *Timberlane* did not "in effect . . . cast aside" its earlier decision in *Occidental*, (Pet. 30). On March 3, 1977, the Ninth Circuit amended its opinion, carefully distinguishing its earlier decision in *Occidental*, finding that "the actions of the Honduran government that are involved here—including the application by its courts and their agents of the Honduran laws concerning security interests and the protection of the underlying property against diminution—*are clearly distinguishable from the sovereign decrees laying claim to off-shore waters that were at issue in Occidental Petroleum. See*, 331 F. Supp. at 99-101 and n.11." (Emphasis added; 549 F.2d at 608).

duran courts *by a private party, not by the Honduran government.* The Ninth Circuit found "no indication that the court action reflected any official Honduran policy that Timberlane's efforts should be crippled or that trade with the United States should be restrained"; that the complaint did not challenge Honduran policy or sovereignty "in any fashion"; and that the action did not "hold any threat to relations between Honduras and the United States." Under these circumstances, the Ninth Circuit held that the act of state doctrine did not require dismissal of the *Timberlane* action. (Pet., App. F. pp. 123a-124a).

In the instant case, the damages complained of in cutting back Hunt's production, shutting off its oil and nationalizing his properties, are all the result *of the actions of the Libyan government, not private parties.* Moreover, based on statements by the Libyan government and the United States government, the court below found that "[t]he American judiciary is being asked to make inquiry into the subtle and delicate issue of the policy of a foreign sovereign, a Serbonian Bog, precluded by the act of state doctrine as well as the realities of the fact finding competence of the court in an issue of far reaching national concern." (Pet., App. A, p. 19a). Indeed, the court of appeals below specifically relied on the *Timberlane* decision in affirming dismissal of the third claim. The court stated:

> The plaintiffs admittedly can only succeed if they establish the motivation of Libya in making the seizure. The United States has characterized it as an act of political reprisal. We are now asked to determine that Libya would not have so acted had it not been for the conspiracy of the defendants. As recently indicated in *Timberlane Lumber Co.* v. *Bank of America* [citation omitted], "We wish to avoid 'passing on the validity' of foreign acts. *Sabbatino,* 376 U.S. at 423. Similarly, we do not wish to challenge

> the sovereignty of another nation, the wisdom of its policy, or the integrity and motivation of its action." (Pet., App. A, 20a-21a at n.14).

Failing to perceive the difference between decisional conflict and factual distinction, petitioners' attempt to show conflict among the circuits is not persuasive. There simply is no decisional conflict in terms of the proper scope and application of the act of state doctrine.

IV.

Finally, petitioners suggest that underlying the application of the act of state doctrine to the third claim, there lurks unacceptable policy implications for antitrust enforcement (Pet. 33-38). They resort to purple rhetoric and indiscriminate charges of "bribery" and secret payments to foreign government officials.

The short answer to this contention is that nowhere in the complaint is there a single allegation charging respondents with payments to foreign government officials in order to promote their corporate objectives, or that any respondent purchased the services of foreign officials.[15] The court of appeals summarily rejected this argument:

> [W]e respectfully disagree with the proposition that 'scandalous payoffs' to foreign potentates or their janizaries provide any basis at all for reconsideration of the [act of state] doctrine in this case. There is no allegation express or implied here that representatives of Libya were seduced or enticed in any manner by the payment of bribes or boodle to take the action complained about. (Pet., App. A, 22a-23a).

In sum, the court below based its findings on the statement of this Court in *Dunhill* to the effect that the act of state doctrine arises out of the basic relationships

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[15] Indeed, petitioners flatly state that "they do not now accuse respondents of improperly inducing the Libyan government to act" (Pet. 33).

between branches of government in a system of separation of powers, and that its application here is particularly appropriate since the Executive Branch has already characterized the motivation of the Libyan government in nationalizing Hunt as political reprisal against the United States government and economic coercion against other U.S. Nationals."[17] Accordingly, the court of appeals determined that "[a]nother inquiry could only be fissiparous, hindering or embarrassing the conduct of foreign relations which is the very reason underlying the policy of judicial abstention expressed in the doctrine in issue" (Pet. 20a).[18] The court stated:

> In sum, the United States has officially characterized the motivation of the Libyan government, the very issue which Hunt now seeks to adjudicate here. The attempted transmogrification of Libya from lion to lamb undertaken here does not succeed in evading the act of state doctrine because we cannot logically separate Libya's motivation from the validity of its seizure. (Pet., App. A, 18a-19a).

To the extent there are policy considerations involved in this case, they clearly require dismissal of the third claim of the complaint on the basis of the act of state doctrine.

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[16] This Court, in analyzing the act of state doctrine in *Dunhill*, 425 U.S. at 697, observed:

> The major underpinning of the act of state doctrine is the policy of foreclosing court adjudications involving the legality of acts of foreign states on their own soil that might embarrass the Executive Branch of our Government in the conduct of our foreign relations. *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. at 427-428, 431-433.

[17] On July 8, 1973, the United States sent a note to the Libyan government in response to the Libyan seizure of Hunt's properties and the public statements of Libya concerning it, characterizing the expropriation as "political reprisal against the United States Government and coercion against the economic interests of certain other U.S. nationals in Libya." A. Rovine, Digest of United States Practice in International Law 1973, at 335.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Of Counsel:

MARK D. WEGENER
HOWREY & SIMON
1730 Pennsylvania Ave., N.W.
Washington, D.C. 20006

RICHARD H. ZAHM
JULIET SHEPARD
Mobil Oil Corporation
150 East 42nd Street
New York, New York 10017
212/883-8315

G. KENNETH HANDLEY
LAWRENCE R. JERZ
Texaco Inc.
135 East 42nd Street
New York, New York 10017
212/953-6000

KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER
425 Park Avenue
New York, New York 10022

EDWARD F. HOWREY
A. DUNCAN WHITAKER
1730 Pennsylvania Ave., N.W.
Washington, D.C. 20006
202/783-0800

Attorneys for Respondent
MOBIL OIL CORPORATION

CHARLES F. KAZLAUSKAS
135 East 42nd Street
New York, New York 10017
212/953-6000

MILTON J. SCHUBIN
425 Park Avenue
New York, New York 10022

Attorneys for Respondent
TEXACO INC.

JOHN W. CASTLES, 3D
HARRY G. SKLARSKY
DAVID H. MARKS
CAROLYN T. ELLIS
LORD, DAY & LORD
25 Broadway
New York, New York 10004

WALLACE L. KAAPCKE
RICHARD J. MACLAURY
PILLSBURY, MADISON & SUTRO
225 Bush Street
San Francisco, Calif. 94104

Attorneys for Respondent
STANDARD OIL COMPANY
OF CALIFORNIA

JOSEPH FERRARO
SHEA, GOULD, CLIMENKO
& CASEY
330 Madison Avenue
New York, New York 10017

BRUCE A. HECKER
330 Madison Avenue
New York, New York 10017
212/661-3200

Attorneys for Respondent
THE BRITISH PETROLEUM
COMPANY LIMITED

ROBERT M. OSGOOD
BARBARA A. MENTZ
SULLIVAN & CROMWELL
48 Wall Street
New York, New York 10005

ROBERT MACCRATE
48 Wall Street
New York, New York 10005
212/952-8100

Attorneys for Respondent
EXXON CORPORATION

FRANK W. MORGAN
Gulf Oil Corporation
P. O. Box 1166
Pittsburgh, Pa. 15230
412/391-2400

JOHN E. BAILEY
P. O. Box 2100
Houston, Texas 77001
713/226-2142

CHARLES O. MURRAY, III
Gulf Oil Co.—U.S.
P. O. Box 2100
Houston, Texas 77001

Attorneys for Respondent
GULF OIL CORPORATION

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